

CONFIDENTIAL SETTLEMENT COMMUNICATION

February 28, 2019

Sent via Email

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Re: Ctr. for Biological Diversity, et al. v. Wheeler, et al., Case No. CV-11-0293-JCS (N.D. Cal.): Initial Settlement Proposal

Dear Counsel:

The purpose of this letter is to set forth the parties' areas of general agreement to date and provide proposals for areas that we initially had tabled for later. This summary is to aid our upcoming conference on whether to request a magistrate to assist in final resolution of this matter through settlement.

I. AREAS OF GENERAL AGREEMENT

I believe the following terms capture our agreements in principle to date, except as noted.

A. Carbaryl and Methomyl

1. **Deadlines**

a. By January 2020, EPA shall complete draft Biological Evaluations on the effects of carbaryl and methomyl, including but not necessarily limited to pesticide products at issue in Claims Nine and Nineteen of the Fourth Amended Complaint, on listed endangered and threatened species and designated critical habitat (“carbaryl and methomyl Biological Evaluations”) and provide notice and a 60-day opportunity for public comment on the draft carbaryl and methomyl Biological Evaluations.

b. By December 2020, EPA shall complete final carbaryl and methomyl Biological Evaluations and initiate consultation, as necessary.

2. **Milestones and Status Reports**

a. No later than April 30, 2019, EPA shall provide notice and a 45-day opportunity for public comment on its “Refined Methodologies,” including in what manner EPA plans to consider pesticide use and usage data in complying with duties under Section 7(a)(2) of the Endangered Species Act, 16 U.S.C. § 1563(a)(2).

b. No later than July 31, 2019, EPA shall provide a status report to the Court on its progress toward completing the carbaryl and methomyl draft Biological Evaluations, focused on any agreements or outstanding issues concerning the role of use and usage data in between EPA and any other federal agency.

c. No later than 90 days prior to the deadline to complete draft carbaryl and methomyl Biological Evaluations, EPA shall provide a status report to the Court on its progress toward completing those draft Biological Evaluations and whether it expects to meet that deadline.

d. No later than 90 days prior to the deadline to complete final carbaryl and methomyl Biological Evaluations, EPA shall provide a status report to the Court on its progress toward completing those final Biological Evaluations and whether it expects to meet that deadline.¹

¹ Plaintiffs acknowledge the parties have not discussed this term, nonetheless, Plaintiffs propose it here as reasonable given the amount of time between draft and final Biological Evaluations.

3. Process to Modify Deadlines

- a. If EPA receives requests with good cause to extend the 45-day period for public comment on EPA's "Refined Methodologies," EPA may, within its discretion, extend this comment period for no more than 45 additional days. The parties agree to file a stipulated motion to modify the deadlines for the draft and final carbaryl and methomyl Biological Evaluations by the same number of days of EPA's extension of the public comment period on Refined Methodologies.
- b. If EPA receives requests with good cause to extend the 60-day period for public comment on EPA's draft carbaryl and methomyl Biological Evaluations, EPA may, within its discretion, extend this comment period for no more than 60 additional days. The parties agree to file a stipulated motion to modify the deadline for the final carbaryl and methomyl Biological Evaluations by the same number of days of EPA's extension of the public comment period.
- c. Other than potential modifications as set forth above in paragraphs A.3.a. or A.3.b., the deadlines in paragraph A.1. may only be modified by a motion as set for below in paragraph C.

B. Atrazine and Simazine

1. Deadlines

- a. By July 2020, EPA shall complete draft Biological Evaluations on the effects of atrazine and simazine, including by not necessarily limited to pesticide products at issue in Claims Four and Thirty of the Fourth Amended Complaint, on listed endangered and threatened species and designated critical habitat ("atrazine and simazine Biological Evaluations") and provide notice and a 60-day opportunity for public comment on the draft atrazine and simazine Biological Evaluations.
- b. By June 2021, EPA shall complete final atrazine and simazine Biological Evaluations and initiate consultation, as necessary.

2. Milestones and Status Reports

- a. No later than 90 days prior to the deadline to complete draft atrazine and simazine Biological Evaluations, EPA shall provide a status report to the Court on its progress toward completing those draft Biological Evaluations and whether it expects to meet that deadline.

- b. No later than 90 days prior to the deadline to complete final atrazine and simazine Biological Evaluations, EPA shall provide a status report to the Court on its progress toward completing those final Biological Evaluations and whether it expects to meet that deadline.²

3. Process to Modify Deadlines

- a. If EPA receives requests with good cause to extend the 60-day period for public comment on EPA's draft atrazine and simazine Biological Evaluations, EPA may, within its discretion, extend this comment period for no more than 30 additional days.³ The parties agree to file a stipulated motion to modify the deadline for the final atrazine and simazine Biological Evaluations by the same number of days of EPA's extension of the public comment period.
- b. Other than potential modifications as set forth above in paragraph B.3.a., the deadlines in paragraph B.1. may only be modified by a motion as set for below in paragraph C.

C. Modification of Terms

It was Plaintiffs understanding that the Parties had generally agreed to the usual terms for modification of orders adopting stipulated settlements. Plaintiffs propose additional detail for consideration as follows.

The Order entering the stipulated settlement ("Order") may only be modified by the Court. The Order may be modified upon good cause shown by stipulated motion of all Parties filed with and approved by the Court, including as provided in paragraphs A.3.a., A.3.b., or B.3.a., or upon written motion filed by one of the Parties and granted by the Court. In addition:

1. Any party interested in modifying any term of the Order shall provide all parties written notice of the terms it seeks to modify and the reasons for such modification. The parties shall initially meet and confer within ten days of written notice, and as necessary thereafter, to attempt to file a stipulated motion to modify the Order, within the timeframes provided below.
2. If EPA is seeking to modify a deadline, other than as provided in paragraphs A.3.a., A.3.b., or B.3.a., it shall provide written notice at least ____ days prior to the deadline in the Order. If the Parties are unable to file a stipulated motion, EPA shall move to modify the deadline at least ____ days prior to the deadline in the Order.

² Plaintiffs acknowledge the parties have not discussed this term, nonetheless, Plaintiffs propose it here as reasonable given the amount of time between draft and final Biological Evaluations.

³ Plaintiffs propose a 30-day extension period as a compromise to EPA's proposed comment deadlines for carbaryl and methomyl, and to account for the fact that the public will already have commented on the draft carbaryl and methomyl Biological Evaluations, therefore, there should be less need for 60 additional days for public comment on atrazine and simazine.

3. Any party seeking to modify any term of the Order other than a deadline shall provide written notice at least 30 days prior to moving to modify the Order.

D. Enforceability of Terms

EPA agreed to a two-step process to enforce the terms of the Order: first, a party may move to enforce the terms of the Order without seeking contempt, and second, a party may seek contempt of any court order enforcing the terms of the Order. Plaintiffs propose the following language to implement this general agreement:

1. If Plaintiffs believe that EPA has failed to comply with any term of the Order, Plaintiffs' first remedy shall be a motion to enforce the terms of the Order. In any motion to enforce the terms of the Order, Plaintiffs may also seek other relief to protect endangered or threatened species or their habitat put at risk from EPA's failure to comply with the terms of the Order.

2. Plaintiffs shall not institute a proceeding for contempt of court unless EPA is in violation of a separate order of the court resolving a motion by Plaintiffs to enforce the terms of the Order.

3. Prior to filing any motions contemplated by paragraphs D.1. or D.2., Plaintiffs shall provide written notice to the parties of its dispute at least 30 days prior to seeking relief from the Court. The parties shall initially meet and confer within ten days of written notice, and as necessary thereafter within the 30 days of Plaintiffs' notice to attempt to resolve the dispute.

II. PROPOSALS FOR OTHER TERMS OF SETTLEMENT

The main issue areas are deadlines for chlorpyrifos and diazinon, the remaining 29 claims concerning other active ingredients, and any interim limitations on use while EPA complies with its ESA duties. In addition, we have not specifically addressed some of the other general terms.

A. Chlorpyrifos and Diazinon

To date, EPA has maintained that its hands are tied on chlorpyrifos and diazinon because it initiated consultations and FWS has not yet completed biological opinions. Plaintiffs propose the following deadlines for these two claims.

1. Within ten business days of receipt from the U.S. Fish and Wildlife Service ("FWS") of the draft biological opinions on the effects of chlorpyrifos and diazinon, including but not necessarily limited to pesticide products at issue in Claims Eleven and Twelve of the Fourth Amended Complaint, EPA shall make the draft biological opinions available to the public for a 60-day comment period;

2. Within 30 days of receipt from FWS of the final chlorpyrifos and diazinon biological opinions, EPA shall notify the Parties, in writing, of the actions it will take, as necessary, to implement any Reasonable and Prudent Alternatives (“RPA”) or other actions it will take, as necessary, to avoid likely jeopardy to endangered or threatened species or destruction or adverse modification of designated critical habitat, including the timeframes in which EPA intends to take these actions;

3. Nothing in this Stipulated Settlement precludes any party from challenging any final biological opinions on the effects of chlorpyrifos or diazinon in a separate action from the present matter.

B. Remaining 29 Other Claims

1. Deadlines for 9 Other Claims

a. By January 15, 2022, EPA shall complete final Biological Evaluations and initiate consultation, as necessary, for four or more of the active ingredients contained in the pesticide products at issue in the Fourth Amended Complaint.

b. By December 31, 2022, EPA shall complete final Biological Evaluations and initiate consultation, as necessary, for five or more of the active ingredients contained in the pesticide products at issue in the Fourth Amended Complaint.

2. Remaining 20 Claims

a. By a date certain, to be discussed, EPA shall complete final Biological Evaluations and initiate consultation, as necessary, for the remaining active ingredients contained in the pesticide products at issue in the Fourth Amended Complaint.

b. The Parties shall meet and confer in March 2021 concerning the remaining twenty claims to assess the status of those active ingredients and pesticide products and to determine whether to modify the Order adopting the stipulated deadline to establish deadlines at that time.

C. Interim Use Limitations

Plaintiffs propose for discussion the following interim use restrictions.

1. If EPA determines its registration actions are likely to adversely affect a listed species or its critical habitat, EPA shall restrict the use of those pesticides within each such species critical habitat, if designated, by including the prohibitions on Bulletins Live! Two.

2. If the label for any pesticide product containing an active ingredient that EPA determines is likely to adversely affect any species or designated critical habitat does not

include a reference to Bulletins Live! Two, the Parties agree to implement a label change to include such reference.

3. The interim use limitations shall remain in place until such time EPA demonstrates that it has implemented any actions, as necessary, to avoid jeopardy to species or to avoid destruction or adverse modification of critical habitat.

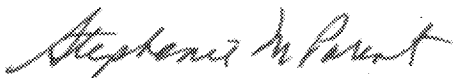
D. General Settlement Terms

The following is a non-exclusive list of other terms that are important to Plaintiffs. There likely are other terms for the parties to discuss.

1. The Court shall retain jurisdiction over this case until such time that EPA demonstrates that it has complied with its procedural and substantive duties under the ESA with respect to the pesticides at issue in the Fourth Amended Complaint.
2. EPA shall provide status reports to the court every six months, beginning after the status reports on atrazine and simazine, included above, on its progress to satisfy its ESA duties.
3. Within the settlement timeframes, EPA shall fulfill any duties the agencies may have to any “applicant” under Section 7 of the ESA, 16 U.S.C. § 1536.
4. Nothing in this settlement agreement would preclude EPA or the Services from engaging in consultations on pesticides or pesticide products that are not named in the Fourth Amended Complaint.
5. Reservations of rights.
6. Plaintiffs are entitled to costs and fees, including reasonable attorney fees. EPA and Plaintiffs shall make good faith efforts to settle the amount of costs and fees. If they are unable to reach a settlement, Plaintiffs may file a motion with the Court to resolve the matter.

Plaintiffs look forward to further good faith discussions to resolve this matter.

Sincerely,



Stephanie M. Parent
Counsel for Plaintiffs